FOR ARGUMENT

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-447

WILLIAM G. MILLIKEN, et al,

Petitioners,

v.

RONALD G. BRADLEY, et al,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF OF PETITIONERS MILLIKEN, ET AL

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INTRODUCTION

This reply brief is filed on behalf of petitioners Governor, Attorney General, State Treasurer, State Board of Education and Superintendent of Public Instruction, all of whom are officials or boards in the executive branch of state government in Michigan.[1]

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[1] Petitioners Milliken, et al, defendants below, will be called collectively, "Milliken, et al," and individually by the title of their offices, i.e., "Governor," "State Board," etc.; respondents Bradley, et al, plaintiffs below, will be called "plaintiffs"; respondent Board of Education of the School District of the City of Detroit, defendant below, will be called "Detroit Board," and respondent Detroit Federation of Teachers, Local 231, intervenor below, will be called "Federation."

The filing of this reply brief is occasioned by the briefs of plaintiffs and the Detroit Board which contain inaccurate statements and raise for the first time in this case, in this Court, new contentions neither raised nor considered below. These new contentions relate to the alleged waiver of Eleventh Amendment immunity pursuant to federal or state statutes and, failing that, a plea that this Court reverse almost 90 years of settled Eleventh Amendment jurisprudence dating back to *Hans* v *Louisiana*, 134 US 1 (1890). See plaintiffs' brief, pp 38-44, and Appendix A, and the Detroit Board's brief, pp 61-76. As a general rule, this Court will not consider contentions raised for the first time in this Court. *Lawn* v *United States*, 355 US 339, 362 n 16 (1958). This general rule, petitioners submit, is applicable here and should be observed.[2] Assuming *arguendo* that this Court will consider these new contentions, petitioners will, later in this brief, demonstrate that under established case law such new contentions are without merit.

[2]

The Detroit Board's brief, at p 45, makes the erroneous assertion that petitioners have never raised the Tenth Amendment herein until their petition for a writ of certiorari on September 24, 1976. Petitioners raised the Tenth Amendment and *Bradley* v *School Board of Richmond, Virginia*, 462 F2d 1058 (CA 4, 1972), aff'd by equally divided court, 412 US 92 (1973), a case decided thereunder, in their brief in this Court in *Milliken* v *Bradley*, 418 US 717 (1974). Further, *National League of Cities* v *Usery*, ... US ..... ; 96 S Ct 2465 (1976), was decided on June 24, 1976, after the briefs were filed and oral argument had taken place in the Court of Appeals below. Petitioners raised *Usery, supra*, in their petition for stay in the Sixth Circuit Court of Appeals.

I.

PLAINTIFFS' POSITION IN THE COURTS BELOW AND IN THIS COURT WITH REGARD TO THE "EDUCATIONAL COMPONENTS" IS MANIFESTLY INCONSISTENT.

During the remedial proceedings following this Court's remand in *Milliken* v *Bradley, supra*, plaintiffs' counsel argued in the District Court that the constitutional violations herein were not with respect to the educational program areas encompassed by the "educational components."[3] (R June 26, 1975, 131) Consistent with that position, plaintiffs' desegregation plan filed below dealt solely with pupil reassignment. It contained no "educational components." (PA 24a) Plaintiffs' expert witness, who prepared such plan, testified that the plan eliminated segregation in the Detroit city schools in conformity with this Court's remand of this cause. (A 58) On appeal, plaintiffs informed the Court of Appeals, in their brief, that the "educational components" were "wholly unrelated to desegregation

[3]

Hereafter, references to the appendices, the record and the exhibits will be enclosed in parentheses and indicated as follows:

Appendix to Petition for Writ of Certiorari, "PA" followed by the page number, e.g., (PA 12a).

Appendix, "A" followed by the volume number and the page number, e.g., (A 12).

Record of the remedy hearings covering the period from April 29, 1975 to June 27, 1975, "R" followed by the volume number and the page number, e.g., (R I 12).

Record of other proceedings, "R" followed by the date of the proceedings and the page number, e.g., (R Dec 1, 1975, 12).

Exhibits, the initial of the party, P for plaintiffs, M for Milliken, D for Detroit Board of Education, and F for Detroit Federation of Teachers, followed by an "X" and the number of the exhibit, e.g., (MX 1).

of students and faculty in schools." See main brief of petitioners, Milliken, et al, at pp 18-19.

For the first time in this Court plaintiffs now claim that the "educational components" are necessary aspects of relief herein. Such claim is patently inconsistent with plaintiffs' conduct in the lower courts.

II.

THE POSITION OF THE DETROIT BOARD HEREIN WITH REGARD TO THE EDUCATIONAL PROGRAMS PROVIDED BY IT TO ITS STUDENTS IS PATENTLY INCONSISTENT.

Following the violation trial in this cause, the Detroit Board submitted its brief to the District Court under date of July 28, 1971. In its post-trial brief, the Detroit Board claimed the following:

1. "THE DETROIT BOARD OF EDUCATION DOES NOT DENY AN EQUAL EDUCATIONAL OPPORTUNITY TO ANY OF ITS STUDENTS." Brief, p 77

2. "Variations in Achievement Levels are Due to Socio-Economic Status not Race or Acts of the Detroit Board of Education." Brief, p 81

3. "The Detroit Board of Education Does Not Deny Any Child an Equal Educational Opportunity by Depriving him of Equal Educational Resources." Brief, p 83

4. "Schools Wherein Black Students Predominate Are Not, For That Reason Alone, Inferior Schools Either in Fact or as Perceived by the Community." Brief, p 88

Moreover, in the subsequent violation opinion of the District Court, *Bradley* v *Milliken*, 338 F Supp 582 (ED Mich, 1971), the trial court made no finding of any constitutional violation with regard to the scope and content of educational programs within the Detroit school system.

However, in this appeal the Detroit Board takes a contrary position, arguing that the "educational components" are necessary to remedy alleged educational inequities of its own creation in the Detroit school system. See the Detroit Board's brief in opposition to certiorari, p 9, and its subsequent brief on the merits, p 15. This change in position is clearly designed to unlock the State Treasury.

Obviously, the Detroit Board does not need any federal court order to expand its existing educational programs with regard to in-service training, testing, guidance and counseling and reading. The court order is needed only if additional, unappropriated state funds are to be secured from the State Treasury by federal judicial decree.

III.

THERE IS NO CONSTITUTIONAL VIOLATION HEREIN TO SUPPORT THE SYSTEM WIDE EXPANSION OF EXISTING EDUCATIONAL PROGRAMS DECREED BELOW.

The view of respondents herein concerning violation and remedy is very elastic. Previously, respondents attempted to stretch a single school district pupil assignment violation into a massive multi-school district pupil reassignment remedy embracing 54 school districts and affecting 779,000 pupils in a three county area. *Milliken v Bradley, supra,* 418 US, at 729, 733 n 14, 752. Currently, respondents are attempting to strain

a pupil assignment violation into a remedy compelling the system wide expansion of existing educational programs financed with unappropriated state funds. In respondents' view, once a pupil assignment violation has been found, the chancellor, in framing relief, somehow assumes all of the educational and financial powers of the locally elected school board and the elected state legislature.

Under the established precedents of this Court, "the scope of the remedy is determined by the nature and extent of the constitutional violation." *Milliken* v *Bradley, supra,* 418 US, at 744. The appropriate remedy for unlawful attendance patterns is pupil reassignment. Once that has been accomplished the judicial function has been fully performed. *Pasadena City Board of Education* v *Spangler,* ..... US .....; 96 S Ct 2697, 2705 (1976). These controlling precedents have not been followed below in this cause.

In the violation decision herein, after reviewing all of plaintiffs' evidence offered at trial to prove alleged violations, the District Court found a violation only with respect to pupil assignment. The trial court held that there was no violation with regard to faculty assignment. The District Court made absolutely no finding of any constitutional violation with regard to educational programs or the allocation of educational resources and opportunities within the Detroit school system. Moreover, the District Court made no findings concerning the academic achievement levels of students in the Detroit school system. *Bradley* v *Milliken,* 338 F Supp 582 (ED Mich, 1971). Since there has been no adjudication in this cause of a Fourteenth Amendment violation as to the scope and content of educational programs in the Detroit school system, the court ordered expansion of existing educational programs decreed below should be reversed.

The plain wording of the District Court's memorandum

remedy opinion of May 11, 1976, concerning the educational components demonstrates that the Court was concerned, not with pupil reassignment for a unitary school system, but with the "quality of education" in the Detroit school system. In the concluding portion of such opinion, the trial court summarized its perception of desirable educational goals as follows:

> "The judgment entered on this date will provide the Detroit Board of Education with sufficient lead time to plan for an implement the components mandated. *Besides adding several new components, we have sought to strengthen those programs now in existence.* In entering our judgment today, we acknowledge our awareness that this litigation must be finalized. The school system must be afforded the opportunity to devote its energies to *perfecting the education of Detroit school children,* something it has not been able to do since this litigation began. The entry of our judgment today should also advise a troubled community *that the court is indeed concerned with the quality of education in a system undergoing desegregation.* The school district must, if necessary, adjust its priorities to accommodate the cost of the educational components mandated so *that the children of Detroit will reap the benefits of a greatly improved educational system.* It is our hope that the judgment, together with the numerous orders we have previously entered, will provide the community and the school system with an opportunity *to fulfill their educational aspirations.*" (emphasis added) (PA 135a-136a)

The Court of Appeals enunciated its own perception of desirable educational goals in terms of the "motivation and achievement levels which the desegregation remedy is designed to accomplish." (PA 171a) These educational concerns provided the Court of Appeals with its rationale for affirmance.

Clearly, the above quoted language demonstrates that the lower courts acted according to their respective notions of desirable educational policy unrelated to constitutional requirements. *Keyes* v *School District No 1, Denver, Colorado,* 521 F2d 465, 483 (CA 10, 1975), *cert den,* 423 US 1066 (1976). Quality education is a general educational goal of citizens, parents and public officials in the executive and legislative branches of state and local government. However, quality education is not a protected right under the Constitution to be secured by the federal courts. *San Antonio Independent School District* v *Rodriguez,* 411 US 1, 35 (1973).

For example, the court ordered employment of elementary school counselors manifestly does not restore anyone to the position he would have occupied in the absence of unlawful pupil assignment conduct. See petitioners' main brief, at p 13 n 9, and *Milliken* v *Bradley, supra,* 418 US, at 746. Rather, such order simply expands the existing junior and senior high school counseling program of the Detroit school system to the elementary school level in accord with the lower courts' perception of desirable educational policy. There is no constitutional right to elementary school counselors in the public schools. *San Antonio Independent School District* v *Rodriguez, supra,* 411 US, at 35.

The four "educational components" here at issue were ordered into effect nine months after peaceful implementation of pupil reassignment, on a system wide scale far exceeding the number of schools involved in pupil reassignment. See petitioners' main brief at p 14. Thus, there is simply no relationship between pupil reassignment and these "educational components." Rather, the components represent the lower courts' attempt to impose educational policies by judicial decree in the absence of any adjudicated educational violation.

For the first time in this case, in this Court, plaintiffs contend, at pp 27-28 of their brief, that there is express congressional authorization for the inclusion of the four "educational components" here at issue in judicially imposed school desegregation remedies. However, that contention must fall based upon an examination of the federal statutes relied upon by plaintiffs.

The statutory provisions relied upon by plaintiffs, 20 USC 1601 *et seq,* the Emergency School Aid Act, constitute a congressional appropriation of federal funds to school districts undergoing court ordered desegregation or voluntarily eliminating minority group isolation. 20 USC 1603, 1605. This statute provides federal funds for auxiliary programs rather than for basic desegregation activities. *Kelsey* v *Weinberger,* 498 F2d 701, 711 (CA DC, 1974). There is no language in the statute authorizing the federal courts to require any of these auxiliary programs or to require payment for such programs with state funds in school desegregation decrees.

Turning to 20 USC 1701 *et seq,* the Equal Educational Opportunity Act of 1974, we find the Congress specifying appropriate remedies for the elimination of dual school systems, consistent with the authority of the courts to enforce the Fourteenth Amendment. 20 USC 1702 (b). In 20 USC 1712-1718, the appropriate judicial remedies set forth by the Congress concern pupil reassignment. Congress did not authorize court ordered educational program expansion as an appropriate judicial remedy in school desegregation cases. In short, Congress has not authorized the federal courts to require either "educational components" or the financing of same with state funds in school desegregation remedial orders.

In summary, the system wide expansion of existing educational programs ordered below is unsupported by any adjudicated educational violation in this cause. The lower courts, acting solely upon their own perception of desirable educa-

tional policy, have assumed control of curriculum in the public schools without any authorization for such control in the Constitution, the decisions of this Court or congressional legislation. The lower federal courts lack the power to control public school curriculum, regardless of how much a local board of education may approve of court orders directing that court ordered curriculum expansion be financed with additional, unappropriated state funds.

IV.

THE COERCIVE FINANCIAL RELIEF ORDERED BELOW, COMPELLING PAYMENT OF 5.8 MILLION DOLLARS IN ADDITIONAL, UNAPPROPRIATED FUNDS FROM THE STATE TREASURY, IS A MONEY JUDGMENT AGAINST THE STATE OF MICHIGAN PROHIBITED BY THE ELEVENTH AMENDMENT.

The Court of Appeals opinion here under review states that "[w]e see no reason at this time for upsetting the judgment that the State of Michigan pay 50 percent of the costs of the desegregation plan to the extent prescribed by the District Court." (PA 180a) Subsequently, petitioners sought and were denied a stay. Thereafter, that money judgment was satisfied for the 1976-1977 school-fiscal year when, on October 18, 1976, the State Treasurer transmitted to the Detroit Board a warrant drawn on the State Treasury in the sum of $5,822,500 although the legislature had not appropriated the moneys therefor. See Mich Const 1963, art 9, § 17. The above sum represented 50 percent of the cost of implementing the four "educational components" here at issue, as computed by the Detroit Board, for the 1976-1977 school fiscal year.

The "educational components" here at issue will be implemented by persons employed, paid and assigned by the Detroit

Board of Education based on the educational program submissions of the Detroit Board ordered into effect. (PA 127a-131a) *Milliken* v *Bradley, supra,* 418 US, at 742-743 n 20. Thus, the money judgment entered below was paid from the State Treasury to the Detroit Board of Education in conformity with such judgment.

Respondents' claim, that this coercive financial relief is merely prospective injunctive relief with an ancillary effect on the State Treasury, is akin to claiming day is night and night is day. The judicial decree was to pay money and, indeed, the decree was satisfied by the payment of unappropriated moneys from the State Treasury. Absent such payment, it is clear that there would not have been compliance with the money judgment decreed below.

Here, as in *Edelman* v *Jordan,* 415 US 651, 668 (1974), the prohibited relief is a direct money judgment to be paid from state funds as a form of compensation for the claimed effects of the alleged prior wrongdoing of defendant state officials. (PA 170a, 178a, 180a) The effect on the State Treasury is direct, not ancillary. Thus, the coercive financial relief decreed below is violative of the Eleventh Amendment.

V.

CONGRESS HAS NOT ABROGATED THE ELEVENTH AMENDMENT IMMUNITY OF THE STATES IN 20 USC 1701 ET SEQ.

For the first time in this case, in this Court, plaintiffs claim, at pp 38-41 of their brief, that pursuant to 20 USC 1701 *et seq*, the Equal Educational Opportunity Act of 1974, the Congress has abrogated the Eleventh Amendment immunity of the State of Michigan by authorizing suit in federal court against peti-

tioner, State Board of Education. 20 USC 1720(a), 881(k). That claim, we submit, is clearly erroneous.

In *Edelman* v *Jordan*, *supra*, 415 US, at 675-677, this Court rejected the argument "that § 1983 was intended to create a waiver of a State's Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the State itself." So here, the purported authorization to sue one state agency, the State Board of Education, in federal court, does not exhibit any congressional intent to abrogate the Eleventh Amendment immunity of the states, since the statute does not authorize suits against the states.

In *Milliken* v *Bradley*, *supra*, 418 US, at 722, this Court recognized that, although the State Board of Education is a party defendant herein, the ". . . State of Michigan as such is not a party to this litigation . . ." However, since the relief decreed below is the payment by the State Treasurer of unappropriated funds from the State Treasury, the State of Michigan ". . . is entitled to invoke its sovereign immunity from suit. . . ." *Ford Motor Co* v *Department of Treasury of Indiana*, 323 US 459, 464 (1945).

In *Fitzpatrick* v *Bitzer*, US ; 96 S Ct 2666 (1976), this Court held that Congress may, pursuant to § 5 of the Fourteenth Amendment, enact legislation abrogating the Eleventh Amendment immunity of the States. The necessary predicate for this doctrine is a finding of congressional intent to abrogate Eleventh Amendment immunity.

In *Fitzpatrick* v *Bitzer*, *supra*, the statute before this Court expressly authorized suits against State governments as employers and expressly authorized the courts to grant both backpay awards and attorney fees. In contrast, 20 USC 1701, *et seq*, does not authorize suits against the States. Indeed, the most

that respondents claim is that it authorizes suits against state boards of education based on 20 USC 1703, 1720(a) and 881(k). Further, the remedial provisions of 20 USC 1701 *et seq*, see 1712-1718, are limited to pupil reassignment. Such provisions authorize neither judicially decreed "educational components" nor judicially compelled payments from state treasuries. Thus, both as to parties and the scope of relief, it is clear that 20 USC 1701 *et seq* does not exhibit any congressional intent to abrogate the Eleventh Amendment immunity of the states.

Moreover, the challenged relief decreed herein is directed at the "state defendants" or the "State of Michigan." (PA 146a-147a, 180a). It is not limited to petitioner, State Board of Education. Further, the coercive financial relief was implemented by petitioner, State Treasurer, a party defendant joined after conclusion of the violation phase of this litigation for remedy purposes. See petitioners' main brief at p 15 and the brief of plaintiffs at p 4, n 1.

Assuming *arguendo* that the provisions of 20 USC 1701 *et seq* were intended to abrogate the Eleventh Amendment immunity of the states, the retrospective application of such statute, passed in 1974, to a case commenced in 1970 and tried on the merits in 1971, would create manifest injustice. See *Bradley* v *School Board of the City of Richmond*, 416 US 696, 716-721 (1974). Although the statute in question was enacted in 1974, plaintiffs failed to invoke the statute in this cause until this appeal in 1977. See brief of plaintiffs, at p 41, n 27. Further, since the statute in question would, as interpreted by plaintiffs, strip the State of Michigan of important constitutional rights under the Eleventh Amendment, a consequence not heretofore raised in this case, retrospective application would constitute manifest injustice.

VI.

THERE HAS BEEN NO STATE STATUTORY WAIVER OF ELEVENTH AMENDMENT IMMUNITY AS TO PETITIONER, STATE BOARD OF EDUCATION.

For the first time in this case, in this Court, respondents claim a state statutory waiver of immunity as to petitioner, State Board of Education, relying upon the opinion in *Oliver* v *Kalamazoo Board of Education*, ... F Supp ....., No. K-88-71, (WD Mich, November 5, 1976), appeal pending. See plaintiffs' brief, pp 41-42, and the Detroit Board's brief, pp 73-76. That claim, as will be demonstrated below, is without merit.

In *Oliver, supra*, the trial court awarded attorney fees against the State Board of Education pursuant to 20 USC 1617 and *Fitzpatrick* v *Bitzer, supra*. Thus, the language of the opinion concerning an alleged waiver of Eleventh Amendment immunity by state statute is, at best, gratuitous dictum.

This Court has consistently held that it will find a waiver of a state's constitutional protection under the Eleventh Amendment only where the state has *expressly* and *clearly* demonstrated its intent to submit its fiscal problems to the federal courts. *Edelman* v *Jordan, supra*, 415 US, at 673. Under that controlling test, it is clear that there is no state statutory waiver applicable herein.

In MCLA 388.1007; MSA 15.1023(7), the Michigan legislature has provided as follows:

> "The state board of education is a body corporate and . . . may sue and be sued, plead and be impleaded in all the courts in this state . . . ."

The above quoted language contains no express language concerning the federal courts. Further, the federal courts constitute a nationwide system of courts not confined to a single state. In addition, this Court has construed state statutory provisions containing language somewhat similar to that quoted above as not constituting a clear waiver of sovereign immunity. *Chandler* v *Dix*, 194 US 590, 591-592 (1904); *Kennecot Copper Corp* v *State Tax Commission*, 327 US 573, 575 n 1, 579, 580 (1946). See also *Hamilton Manufacturing Company* v *The Trustees of the State Colleges in Colorado*, 356 F2d 599, 601-602 (CA 10, 1966); *Oklahoma Real Estate Commission* v *National Business and Property Exchange*, 229 F2d 205, 206-207 (CA 10, 1955).

Most importantly, the money judgment relief decreed herein is not limited to petitioner, State Board of Education. It is directed to the "state defendants" or the "State of Michigan." (PA 146a-147a, 180a) Further, the money judgment was paid, not by the State Board of Education, but by the State Treasurer, a party joined after conclusion of the violation phase of this litigation for remedy purposes. See petitioners' main brief at p 15 and the brief of plaintiffs at p 4 n 1. There is no basis for any claim of statutory waiver as to either the state treasurer or the State of Michigan.

VII.

THE ELEVENTH AMENDMENT IMMUNITY OF THE STATES HAS NOT BEEN REPEALED BY THE FOURTEENTH AMENDMENT OR ABROGATED BY CONGRESSIONAL ENACTMENTS.

For the first time in this case, in this Court, in plaintiffs' brief, pp 42-44 and Appendix A, and the Detroit Board's brief, pp 61-73, several more new contentions have been raised as

to the applicability of the Eleventh Amendment herein in light of the Fourteenth Amendment and several federal statutes. They are without merit within the framework of the settled precedents of this Court.

The Eleventh Amendment clearly applies to federal question claims against the states in federal courts. This Court has so held from *Hans* v *Louisiana, supra,* to *Edelman* v *Jordan, supra.* See also *Whitner* v *Davis,* 410 F2d 24, 29 (CA 9, 1969); *Meyer* v *New Jersey,* 460 F2d 1252, 1253 (CA 3, 1972).

Further, the Eleventh Amendment immunity of the states is applicable in cases brought against the states under the Fourteenth Amendment. For example, in *Ford Motor Co* v *Department of Treasury of Indiana, supra,* 323 US, at 460-461, the plaintiff alleged, *inter alia,* a violation of the Fourteenth Amendment and yet this Court applied the doctrine of Eleventh Amendment immunity. More recently, in *Edelman* v *Jordan, supra,* 415 US, at 670-671, this Court overruled its decision in *Shapiro* v *Thompson,* 394 US 618 (1969) to the extent that such decision affirmed the lower court decree compelling, under the Fourteenth Amendment, the payment of retroactive welfare benefits from the State Treasury.

The law is settled that 42 USC 1983 was not intended to abrogate a state's Eleventh Amendment immunity. *Edelman* v *Jordan, supra,* 415 US, at 675-677. Neither a city, *Monroe* v *Pape,* 365 US 167 (1961), nor a state is a "person" within the meaning of 42 USC 1983. *Fitzpatrick* v *Bitzer, supra,* ..... US ; 96 S Ct, at 2669. See also *Whitner* v *Davis, supra,* 410 F2d, at 29; and *Deane Hill Country Club, Inc* v *City of Knoxville,* 379 F2d 321, 324 (CA 6, 1967), *cert den,* 389 US 975 (1967).

The argument that 28 USC 1331 abrogates the Eleventh Amendment immunity of the states is erroneous. That statu-

tory provision is a jurisdictional statute which does not create any rights. *Lyle* v *Village of Golden Valley,* 310 F Supp 852, 855 (D Minn, 1970). It is an exercise of congressional power, pursuant to Article III of the Constitution and *Lockerty* v *Phillips,* 319 US 182, 187 (1942), to define the jurisdiction of the lower federal courts rather than an exercise of congressional authority to enforce § 5 of the Fourteenth Amendment.

Indeed, as early as *Hans* v *Louisiana, supra,* 134 US, at pp 9 and 15, this Court applied the states' Eleventh Amendment immunity in a case brought under the statutory forerunner of 28 USC 1331 conferring federal question jurisdiction upon the federal courts. In addition, as recently as *Mt. Healthy City School District* v *Doyle,* 45 USLW 4079, 4081 (January 11, 1977), this Court was deciding cases under 28 USC 1331 without any intimation that such statute, itself, abrogated the Eleventh Amendment immunity of the states.

In summary, the consistent holdings of this Court from at least 1890 to the present compel the conclusion that Eleventh Amendment immunity is applicable in federal question claims against the states, including claims under the Fourteenth Amendment, and that neither 42 USC 1983 nor 28 USC 1331 has abrogated such immunity. The respondents herein offer neither precedent nor logic to support their contrary contentions in this cause. This settled legal framework, with its regard for the role of the states in our federal system, should, we submit, be preserved. Any departure from this framework should emanate only from the conscious, express choice of Congress, in the enactment of enforcement legislation under § 5 of the Fourteenth Amendment, as illustrated in *Fitzpatrick* v *Bitzer, supra.* Here, as demonstrated above, there is no applicable congressional legislation pursuant to § 5 of the Fourteenth Amendment.

CONCLUSION

Education is not a right protected under the Constitution. *San Antonio Independent School District* v *Rodriguez, supra,* 411 US, at 35. Rather, it is a function reserved to state and local governments. The nature and extent of the violation determines the scope of the remedy. There has been no adjudicated Fourteenth Amendment violation with regard to the educational programs in the Detroit school system. *Milliken* v *Bradley, supra,* 418 US, at 744, 746 and 753. Thus, the lower courts, declining to follow the teachings of *Milliken* v *Bradley, supra,* employed a clearly erroneous legal standard to compel the system wide expansion of existing educational programs in the areas of in-service training, testing, guidance and counseling and reading in the Detroit school system.

The Detroit Board needs no federal court order to expand its existing educational programs. The judicial decree is needed only to secure additional, unappropriated funds from the State Treasury.

Under the decisions of the courts below, the Detroit Board has obtained a blank check to be filled in annually by the trial court and drawn upon the State Treasury for the operation of its school system. (PA 180a) This result, we submit, is contrary to the Eleventh Amendment as interpreted by this Court in *Edelman* v *Jordan, supra,* since the money judgment in question directly compels the payment of unappropriated funds from the State Treasury as a form of compensation for the alleged prior misconduct of petitioners.

In compelling the payment of unappropriated funds from the State Treasury, the lower courts have cast aside Michigan's constitutional and statutory provisions reposing the power to appropriate state funds in the Michigan legislature without any ruling that such provisions violate plaintiffs' rights. See pp 27-28 of petitioners' main brief. There has been no finding that any of the petitioners, by their own conduct, committed any act of discrimination with regard to the scope and content of educational programs in the Detroit school system. Moreover, such school system is administered by the Detroit Board, elected by the electors of the district. *Milliken* v *Bradley, supra,* 418 US, at p 742, n 20. Thus, the relief decreed below against petitioners is contrary to the sound principles of federalism enunciated by this Court in *Rizzo* v *Goode,* 423 US 362, 377, 380 (1976).

The states, including Michigan, and their political subdivisions traditionally provide a host of governmental services to their citizens including a system of criminal justice and corrections, social welfare services, mental health services and public education.[4] The Tenth Amendment limits the power

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[4]

Since the original brief of petitioners was filed herein, the revenue estimates for Michigan's general fund budget for fiscal 1976-1977, ending September 30, 1977, have shown an improvement as a result of amendments to tax legislation and an upturn in Michigan's economy which have generated additional tax revenues. Further, at the Governor's direction, his staff has written to the Detroit school system to inquire whether it is willing, jointly with members of the Governor's staff, to review the fiscal situation of the Detroit school system.

of Congress to force its choices upon the states as to the conduct of integral governmental functions. *National League of Cities* v *Usery*, ... US ..... ; 96 S Ct 2465, 2475-2476 (1976). So here, the Tenth Amendment limits the power of the federal courts to impose their choices upon the states as to the allocation of finite state tax revenues among those competing services financed with legislatively appropriated state funds.

The interests involved here include the continued legal, political and fiscal integrity of the states in our federal system of government under the Constitution. The fiscal policies of state governments as to taxation and appropriation of funds should continue to be determined by the elected representatives of the people through the democratic political process under state constitutions and state statutes. This traditional system of state government operation should not be discarded for a judicial remedy which corrects no adjudicated violation.

Previously, this Court rejected respondents' attempt to stretch a pupil assignment violation in a single school district into a massive multi-school district pupil reassignment remedy embracing 54 school districts and affecting 779,000 pupils in a three county area. *Milliken* v *Bradley, supra*, 418 US, at 729, 733 n 14, 752. This Court defined the constitutional right of plaintiffs "to attend a unitary school system" and remanded the case for "formulation of a decree directed to eliminating the segregation found to exist in Detroit city schools." *Milliken* v *Bradley, supra*, 418 US, at 746, 753. Presently, respondents are attempting to strain a pupil assignment violation into a judicially imposed remedy compelling the system wide expansion of existing educational programs financed with unappropriated state funds. Thus, once again, this Court should reverse the opinion and judgment of the Sixth Circuit Court of Appeals, to the extent such opinion and judgment compel Milliken, et al, to pay additional, unappropriated funds from the State Treasury to the Detroit Board to pay for the cost

of court ordered educational program expansion in the Detroit school system.

Respectfully submitted,

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